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No. 06-502

In the Supreme Court of the United States

OLIVIER BANCOULT, ET AL., PETITIONERS

v.

ROBERT S. MCNAMARA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that petitioners' lawsuit, which challenges the Executive Branch's negotiation and implementation of a formal agreement with the British Government during the Cold War to establish a military base on a British territory in the Indian Ocean, presents a nonjusticiable political question.

2. Whether petitioners' lawsuit is time-barred or suffers from other threshold defects that require dismissal.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-20) is reported at 445 F.3d 427. The opinion of the district court (Pet. App. 23-55) is reported at 370 F. Supp. 2d 1.

JURISDICTION

The judgment of the court of appeals (Pet. App. 21-22) was entered on April 21, 2006. A petition for rehearing was denied on July 11, 2006 (Pet. App. 57). The petition for a writ of certiorari was filed on October 9, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners brought this suit against former officials of the United States for alleged torts and violations of international law arising from the displacement of the

local population from the Chagos Archipelago, a British territorial possession in the Indian Ocean, following negotiations between the United States and Britain in the 1960s for the construction by the United States of a military base in the archipelago. Pet. App. 2-5. The district court dismissed petitioners' claims on the ground that they present nonjusticiable political questions, *id.* at 23-55, and the court of appeals affirmed, *id.* at 1-22.

A. Background

1. The Chagos Archipelago (Chagos) comprises 52 islands in the middle of the Indian Ocean, more than 1000 miles from the nearest landmasses of India, Africa, and Australia. Pet. App. 23, 25. The archipelago was ceded to Britain by France in 1814 and remains a British territory today. *Id.* at 25. Initially administered as part of the British colony of Mauritius, Chagos in 1965 was detached and reorganized into the British Indian Ocean Territory (BIOT). *Id.* at 26.

In the 1960s, when the events at issue in this case occurred, the population of the archipelago numbered approximately 1000. Pet. App. 25. Petitioners allege that in 1964, the United States entered into negotiations with the British government to establish a military base in the Indian Ocean. A survey concluded that the archipelago would provide a suitable location for such a facility. The survey also concluded, however, that to construct and operate such a facility, it would be necessary to displace the local population. *Id.* at 3, 26.

In 1966, by a formal exchange of notes between the United States government and the British government, the Chagos Archipelago was set aside for the defense needs of the two nations "for an indefinitely long period." See Availability of Certain Indian Ocean Islands

for Defense Purposes (BIOT Agreement), Dec. 30, 1966, U.S.-U.K., 18 U.S.T. 28, 30. Subsequently, as contemplated during the negotiation of the BIOT Agreement, the Commissioner for the BIOT adopted the Immigration Ordinance, 1971 (BIOT), pursuant to which the local population in the Chagos Archipelago was relocated to Mauritius and Seychelles. See generally *Regina (Bancoult)* v. *Secretary of State for Foreign & Commonwealth Affairs*, [2001] Q.B. 1067, 1075; see Pet. App. 47 ("The removal of the Chagossian population from Chagos was * * * effected under British law and pursuant to the BIOT Agreement."). Petitioners allege that the relocation took place in several stages between 1965 and 1973. *Id.* at 26.

2. With British consent, the United States built a military facility on Diego Garcia that quickly became a crucial base of operations for American forces in the Indian Ocean. Pet. App. 26. In 1975, military leaders requested funding for a major build-up of the base. Concerned about the military and foreign policy implications of an expanded Diego Garcia facility, including particularly the reaction of the Soviet Union, Congress refused to authorize construction until the President himself certified that a U.S. military facility on Diego Garcia was "essential to the national interest of the United States." See Military Construction Authorization Act, 1975, Pub. L. No. 93-552, § 613(a)(1), 88 Stat. 1766. On May 12, 1975, President Ford submitted the following certification to Congress:

> In accordance with * * * the Military Construction Authorization Act, 1975 (Public Law 93-552), I have evaluated all the military and foreign policy implications regarding the need for United States facilities at Diego Garcia. On the basis of this evalua-

> tion * * * I hereby certify that the construction of such facilities is essential to the national interest of the United States.

H.R. Doc. No. 140, 94th Cong., 1st Sess. 1.

Congress also held a series of hearings on issues related to the proposed base, including the fate of the people removed from the Chagos Archipelago. See generally *Diego Garcia, 1975: The Debate over the Base and the Island's Former Inhabitants: Hearings Before the Special Subcomm. on Investigations of the House Comm. on Int'l Relations*, 94th Cong., 1st Sess. (1975). After press accounts indicated that Britain had forced the relocation of people from Chagos, Members of Congress criticized the Executive Branch for leaving the local population's fate in the hands of the British and Mauritian governments. See *id.* at 46, 66, 68, 71. Nevertheless, Congress appropriated funds for the construction of the base on Diego Garcia, see Pet. App. 27, and since that time has repeatedly authorized funds for its expansion.[1] The base today provides a variety of critical support services to American and British forces deployed in the Middle East, including in Iraq and Afghanistan. See *id.* at 26-27, 50 n.10.

Notwithstanding the American military presence, the British government retains sovereignty over Diego Gar-

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[1] See, *e.g.*, Military Construction Authorization Act for Fiscal Year 2003, Pub. L. No. 107-314, § 2201(b), 116 Stat. 2687; Military Construction Authorization Act for Fiscal Year 1992, Pub. L. No. 102-90, § 2401(b), 105 Stat. 1530; Military Construction Authorization Act, 1988 and 1989, Pub. L. No. 100-180, § 2121(b), 101 Stat. 1189; Military Construction Authorization Act, 1986, Pub. L. No. 99-167, § 201(b), 99 Stat. 970; Military Construction Authorization Act, 1984, Pub. L. No. 98-115, § 201, 97 Stat. 765; Military Construction Authorization Act, 1981, Pub. L. No. 96-418, § 201, 94 Stat. 1755.

cia and the rest of the Chagos Archipelago. The 1966 BIOT Agreement expressly stipulates that "[t]he Territory shall remain under United Kingdom sovereignty." Para. 1, 18 U.S.T. at 28. Even U.S. military personnel are subject to British law while on Diego Garcia: the BIOT Agreement provides that "authorities of the Territory shall have jurisdiction over the members of the United States Forces with respect to offenses committed within the Territory and punishable by the law in force there." Annex II, para. 1(a)(ii), 18 U.S.T. at 34.

3. The displacement of people from the Chagos Archipelago is the subject of ongoing litigation in the British courts. On March 3, 1999, petitioner Olivier Bancoult filed an application for judicial review in the British courts to challenge the validity of the BIOT Immigration Ordinance, 1971. See *Regina (Bancoult)*, [2001] Q.B. at 1070. In November 2000, the British High Court (Queens Bench Division) declared that, although the dislocation of people from Chagos was undertaken for "good reasons * * * dictated by pressing considerations of military security," Section 4 of the 1971 ordinance was not a lawful measure for the "peace, order and good government of BIOT," and consequently was invalid. *Id.* at 1104.

In response, in June 2004, the Queen issued two Orders in Council prohibiting the former residents from returning to the Chagos Archipelago. Pet. App. 4 n.1. Those orders restored "full immigration control over the entire territory * * * for defence purposes." See *Foreign and Commonwealth Affairs: British Indian Ocean Territory*, 422 Parl. Deb., H.C. (6th ser.) 33WS (2004).[2]

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[2] Http://www.publications.parliament.uk/pa/cm200304/cmhansrd/vo040615/wmstext/40615m03.htm.

Petitioners then brought a new suit in the British High Court of Justice (Administrative Court), and in May 2006 the court ruled in petitioners' favor. See *Regina (Bancoult)* v. *Secretary of State for Foreign & Commonwealth Affairs*, [2006] EWHC 1038 (Admin.). The British Government's appeal from that ruling is now pending.

B. Procedural History

1. Petitioners filed this putative class action in December 2001, seeking money damages (including punitive damages) on a variety of international law and common-law tort theories. Pet. App. 4-5. In December 2004, the district court accepted the government's scope-of-employment certification under the Westfall Act, and dismissed petitioners' claims against the individual federal officials in favor of claims against the United States under the Federal Tort Claims Act (FTCA). *Id.* at 31-39; see 28 U.S.C. 2679(d)(1); *United States* v. *Smith*, 499 U.S. 160, 163 (1991). The district court then dismissed petitioners' FTCA claims, concluding that petitioners had failed to exhaust their administrative remedies under 28 U.S.C. 2675(a) and that, in any event, any FTCA claim based on petitioners' removal from Chagos would be barred under the foreign country exception, see 28 U.S.C. 2680(k). Pet. App. 6, 39-42 & n.8.

Turning to petitioners' remaining claims, the district court determined that the merits of petitioners' challenge to the United States' policies in the Indian Ocean presented political questions beyond the court's power to adjudicate. Pet. App. 43-54. The court concluded that the gravamen of the suit was an attack on the Executive Branch's judgment and priorities in matters of interna-

tional diplomacy and national security, reasoning that such matters are "'plainly the province of Congress and the Executive[,]' and thus are non-justiciable political questions." *Id.* at 48 (quoting *Luftig* v. *McNamara*, 373 F.2d 664, 665-666 (D.C. Cir.), cert. denied, 387 U.S. 945 (1967)). Accordingly, the district court granted the government's motion to dismiss the suit as nonjusticiable. *Id.* at 55.

2. The court of appeals unanimously affirmed, holding that the action was properly dismissed on political question grounds. Pet. App. 1-20. In reaching that conclusion, the court followed the framework established by *Baker* v. *Carr*, 369 U.S. 186 (1962), and the court's recent application of the *Baker* factors in *Schneider* v. *Kissinger*, 412 F.3d 190 (D.C. Cir. 2005), cert. denied, 126 S. Ct. 1768 (2006). See Pet. App. 10-13.

Petitioners conceded on appeal that "the decision to establish a military base on Diego Garcia" is not judicially reviewable, see Pet. App. 15, but asserted that the district court could nonetheless entertain damages claims challenging the particular manner in which the United States implemented that policy decision, see *ibid.* The court of appeals rejected that argument, explaining:

> [T]he policy and its implementation constitute a sort of Möbius strip that we cannot sever without impermissibly impugning past policy and promising future remedies that will remain beyond our ken. * * * We cannot second guess the degree to which the executive was willing to burden itself by protecting the Chagossians' well-being while pursuing the foreign policy goals of the United States; we may not dictate to the executive what its priorities should have been. * * * If we were to hold that the execu-

> tive owed a duty of care toward the Chagossians, or that the executive's actions in depopulating the islands and constructing the base had to comport with some minimum level of protections, we would be meddling in foreign affairs beyond our institutional competence.

Id. at 16-17. Because adjudicating petitioners' claims would thus "require the court to judge the validity and wisdom of the executive's foreign policy decisions," *id.* at 19, the court held that the claims against the United States were properly dismissed under the principles established by this Court in *Baker*.

The court of appeals also affirmed the dismissal of petitioners' claims against the individual federal defendants. Pet. App. 18-20. Without reaching the question whether the Westfall Act barred any claims against the individual defendants in favor of claims against the United States under the FTCA, the Court had "little trouble" rejecting petitioners' argument that the individual defendants' "acts fell outside the scope of their employment and therefore receive no shelter from the political question doctrine." *Id.* at 18, 19 n.6. The court observed that "[a]ll the acts alleged to have harmed the Chagossians directly furthered, or at least were incidental to, th[e] authorized goal" of depopulating the island and establishing a secure military base. *Id.* at 19. Accordingly, the court rejected petitioners' efforts to hold the individual defendants liable for conduct that would not be justiciable in a suit against the government: "[W]hen the political question doctrine bars suit against the United States, this constitutional constraint cannot be circumvented merely by bringing claims against the individuals who committed the acts in question within the scope of their employment." *Id.* at 20.

3. Petitioners petitioned for rehearing, arguing for the first time that the courts of the United States are bound by principles of comity and reciprocity to defer to the judgment of British courts concerning petitioners' right to return to the archipelago. See Pet. App. 68-75 (rehearing petition). The court of appeals denied the petition with no judge voting to grant rehearing. *Id.* at 57-58.

ARGUMENT

The unanimous decision of the court of appeals is correct and does not conflict with any decision of this Court or any court of appeals. This Court recently denied certiorari in a similar lawsuit that was dismissed on political question grounds. See *Schneider* v. *Kissinger*, 412 F.3d 190 (D.C. Cir. 2005), cert. denied, 126 S. Ct. 1768 (2006). Further review is likewise not warranted here.

1. The court of appeals correctly held that petitioners' claims are not judicially cognizable. Petitioners' lawsuit attacks the Executive Branch's negotiation and implementation of a formal international agreement with a strategic ally for the establishment of a secure military base in the Indian Ocean during the height of the Cold War. As the court of appeals recognized, such claims are beyond the power of the federal courts to adjudicate. "The conduct of the foreign relations of our government is committed by the Constitution to the Executive and Legislative—'the political'—Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision." *Oetjen* v. *Central Leather Co.*, 246 U.S. 297, 302 (1918); see *Haig* v. *Agee*, 453 U.S. 280, 292 (1981) ("Matters intimately related to foreign

policy and national security are rarely proper subjects for judicial intervention.").

Here, the Executive Branch determined that critical national security considerations—including the spread of Soviet influence in the Indian Ocean region—required the United States to pursue the BIOT Agreement with Britain and build a military facility in the Indian Ocean notwithstanding the potential need for relocation of the local people. Congress, in turn, held hearings on the treatment of the local population, but ultimately approved the base and voted to fund its construction and operation. The courts may not now review those decisions through the prism of tort law. As the court of appeals explained, the federal judiciary "cannot second-guess the degree to which the executive was willing to burden itself by protecting the Chagossians' well-being while pursuing the foreign policy goals of the United States; we may not dictate to the executive what its priorities should have been." Pet. App. 17.

Petitioners insist that their claims would not require the courts to second-guess policy choices made by the Executive Branch in the exercise of powers textually committed to it by the Constitution, because "tort claims are governed by legal standards that courts are uniquely capable of discovering and applying." Pet. 20-21. In petitioners' view, senior Executive Branch officials were bound, on pain of damages, to take special care in negotiating the BIOT Agreement with the British Government to protect the interests of the local population—British territorial citizens. Yet petitioners make no attempt to explain how a federal court could meaningfully apply tort-law concepts of reasonableness and undue risk to the sort of diplomatic negotiations and national security judgments at issue here.

As the district court observed:

> The allegations made in the complaint would require the court to assess whether it was proper for Britain and the United States to enter an agreement for the construction of a military base[] in Chagos thirty years ago. This would also demand the court to second-guess the initial and continuing decisions of the executive and legislative branches to exclude civilians from Diego Garcia. Neither our federal law nor customary international law provide standards by which the court can measure and balance the foreign policy considerations at play in this case, such as the containment of the Soviet Union in the Indian Ocean thirty years ago and today, the support of military operations in the Middle East.

Pet. App. 49-50. As the District of Columbia Circuit recently stated in rejecting a similar lawsuit on political question grounds, "recasting foreign policy and national security questions in tort terms does not provide standards for making or reviewing foreign policy judgments." *Schneider*, 412 F.3d at 197; see Pet. App. 10-12 (discussing *Schneider*).

Nor, in any event, could the United States by itself grant petitioners the access to Chagos that they demand. Diego Garcia and the Chagos Archipelago remain under the exclusive sovereignty and control of the British government, not the United States. For plaintiffs to prevail, the federal courts would be required to question, if not explicitly countermand, the United States' international agreements with the United Kingdom concerning civilians' rights of access to a British territory. As this Court's cases make clear, the Constitution for-

bids such a judicial reordering of the Nation's international commitments.

2. Petitioners do not contend that the decision below conflicts with the judgment of any other court of appeals. Rather, they contend that this Court's review is warranted because the District of Columbia Circuit's political question jurisprudence "confuses discretionary political question justiciability with a lack of federal jurisdiction under Article III," Pet. 10, and thus improperly "applie[s] the political question doctrine to limit subject matter jurisdiction." Pet. 9. That is incorrect.

This Court has characterized the political question doctrine as an aspect of "the concept of justiciability, which expresses the jurisdictional limitations imposed on the federal courts by the 'case or controversy' requirement" of Article III of the Constitution. *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U.S. 208, 215 (1974). The Court has explained that "the presence of a political question suffices to prevent the power of the federal judiciary from being invoked by the complaining party." *Ibid.*; see *Japan Whaling Ass'n* v. *American Cetacean Soc'y*, 478 U.S. 221, 230 (1986) (the political question doctrine "excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution" to the political branches). The court of appeals' description of the political question doctrine as "jurisdictional" was therefore entirely consistent with this Court's own description of the doctrine. Pet. App. 7. In any event, even if the court of appeals's terminology were inapt, its reasoning and judgment are sound.

Similarly, petitioners contend that this Court's review is necessary because the District of Columbia Circuit did not engage in the careful justiciability inquiry

required by *Baker*, but rather "determine[d] that all claims are nonjusticiable if the general subject matter of the case is political." Pet. 14. The court of appeals did nothing of the sort. Indeed, the opinion below not only carefully discussed the *Baker* factors, *id.* at 10-13, but expressly stated that "[n]ot every political case presents a political question," Pet. App. 13, and that "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance," *ibid.* (quoting *Baker*, 369 U.S. at 211). As the court of appeals explained, it was not the general subject matter of petitioners' claims that required dismissal under the political question doctrine, but petitioners' effort to impose tort liability on the United States and senior Executive Branch officials based on quintessential determinations of foreign policy and national security. See *id.* at 17 ("If we were to hold that the executive owed a duty of care toward the Chagossians, or that the executive's actions in depopulating the islands and constructing the base had to comport with some minimum level of protections, we would be meddling in foreign affairs beyond our institutional competence."). That approach fully comports with this Court's admonition that the political question doctrine requires "a discriminating analysis of the particular question posed" before dismissal will be justified. *Baker*, 369 U.S. at 211.

Petitioners also urge that the decision below disregards this Court's decision in *Sosa* v. *Alvarez-Machain*, 542 U.S. 692 (2004). Petitioners theorize that if a claim under customary international law satisfies the criteria identified in *Sosa* for enforceability under the Alien Tort Statute, 28 U.S.C. 1350, then that claim necessarily does not present a political question. See Pet. 19-20. That unfounded argument, which petitioners raised for the

first time in their unsuccessful petition for rehearing, erroneously conflates the threshold question of justiciability with the existence of a viable cause of action. *Sosa* did not create an exception to the political question doctrine, and the Alien Tort Statute does not somehow render moot the structural constitutional concerns that animate that doctrine. Where, as here, the constitutional separation of powers precludes federal courts from passing on the policy determinations of the political branches, it makes no difference whether the underlying cause of action could otherwise be asserted under a statute.

3. In the alternative, petitioners urge the Court to accept review based on the court of appeals' alleged "fail[ure] to take into account parallel litigation in the United Kingdom." Pet. 25. Emphasizing their successes in pending litigation before the British High Court of Justice, petitioners assert that "[c]omity required the [District of Columbia] Circuit to remand this case to the District Court for proper attention to the British High Court's judgment." Pet. 26.

That contention is flawed in multiple respects. As an initial matter, although the parallel litigation in British courts was already pending when petitioners filed this appeal, petitioners failed to raise judicial "comity" as a basis for a remand until their petition for rehearing in the court of appeals. See Pet. App. 68. Because petitioners did not timely raise that argument, the court of appeals did not address it, and there is no warrant for this Court to resolve the issue in the first instance. Moreover, plaintiffs fail to explain how the decisions of the British High Court of Justice concerning the local population's right to return to the Chagos Archipelago under *British* law are actually inconsistent with the de-

cisions of the courts below, which addressed petitioners' claims under *United States* law.

In any event, considerations of international judicial comity cannot overcome the constitutional impediments to judicial review in this case. Because federal courts lack competence to decide political questions that the Constitution assigns to the political branches, see, *e.g.*, *Japan Whaling Ass'n*, 478 U.S. at 230; *Schlesinger*, 418 U.S. at 215; *Oetjen*, 246 U.S. at 302, the court of appeals correctly upheld dismissal of petitioners' complaint, irrespective of the progress of parallel litigation by the same plaintiffs in the courts of the United Kingdom.

4. Lastly, this Court's review is not warranted because petitioners' complaint also suffers from a variety of additional jurisdictional defects that the court of appeals had no occasion to reach. First, as the district court recognized, because the Attorney General has certified that the individual federal defendants were acting within the scope of their federal employment, the individual defendants are entitled to dismissal under the Westfall Act, 28 U.S.C. 2679(d)(1), with the United States substituted in their stead. See Pet. App. 31-39. Substitution of the United States under the Westfall Act is required even when relief against the government is precluded under the express terms of the Federal Tort Claims Act. See 28 U.S.C. 2679(d)(4); *Gutierrez de Martinez* v. *Lamagno*, 515 U.S. 417, 422 (1995); *United States* v. *Smith*, 499 U.S. 160, 166 (1991). That is the case here: by petitioners' own account, their alleged injuries arose exclusively in the Chagos Archipelago and on Mauritius, foreign jurisdictions governed by foreign law. Accordingly, under the so-called "foreign country exception" to the FTCA, 28 U.S.C. 2680(k), petitioners cannot avail themselves of the FTCA's limited waiver of

sovereign immunity, and their claims are consequently foreclosed. See Pet. App. 6, 41-42 n.8; *Sosa*, 542 U.S. at 712 ("[T]he FTCA's foreign country exception bars all claims based on any injury suffered in a foreign country, regardless of where the tortious act or omission occurred.").

Petitioners' remaining claims against the United States are similarly flawed. Petitioners assert claims under the Alien Tort Statute and assorted principles of international law, but they identify no waiver of sovereign immunity that would permit such claims to proceed against the United States, and none exists. And in any case, petitioners' claims for relief are plainly time-barred. Petitioners contend that the depopulation of the Chagos Archipelago took place between 1965 and 1973. See Pet. 5; Pet. App. 3. This action was not filed until December 2001, nearly thirty years later. Plaintiffs have made no effort to explain why they could not have brought their claims earlier. Indeed, any such argument would seem to be foreclosed by the 1975 congressional hearings and the related press coverage, which exhaustively explored the United States' involvement in the depopulation of the Chagos Archipelago. See generally *Diego Garcia, 1975: The Debate over the Base and the Island's Former Inhabitants: Hearings Before the Special Subcomm. on Investigations of the House Comm. on Int'l Relations*, 94th Cong., 1st Sess. (1975). Whatever statute of limitations may apply to plaintiffs' customary international law claims, it clearly has run. Accordingly, even if judicial review were not precluded under the political question doctrine, dismissal of the complaint would nevertheless be required.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 2006